In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1075

MICHAEL G. THEVIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1091

PEACHTREE NEWS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury-waived trial in the United States District Court for the Middle District of Florida, petitioners were convicted of twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. 1462 under guidelines in effect prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15. On each count, Peachtree News Company was fined $5,000 of which payment of $3,500 was suspended (Pet. 13). Petitioner Thevis was sentenced to twelve concurrent terms of five years' imprisonment, of which the court ordered six months

served in a jail-type institution and the remainder suspended, with petitioner to serve five years' probation. In addition, on each count Thevis was fined $5,000, of which payment of $4,000 was suspended (Pet. 5). The court of appeals affirmed as to six counts (Pet. App.).

Petitioners argue that this Court's decision in *Miller* v. *California, supra,* teaches that 18 U.S.C. 1462 was unconstitutionally vague on its face and as applied, at least until *Miller* was decided and Section 1462 was given a limiting construction by *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 130 n. 7.

Counsel for petitioner Thevis, Stanley Fleishman, has made the same arguments to this Court (with respect to 18 U.S.C. 1461) on behalf of William L. Hamling, *Hamling* v. *United States,* No. 73-507, argued April 15, 1974. These contentions are fully discussed in our brief in *Hamling,* No. 73-507.

1. In brief, petitioner first contends that the fact that 18 U.S.C. 1462 did not contain a specific description of lewd sexual conduct, as required by *Miller,* made the statute vague on its face. But prior to *Miller* the federal obscenity statutes were sustained by this Court against vagueness challenges. For example, in *Roth* v. *United States,* 354 U.S. 476, 491, the Court said:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. "* * *[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo,* 332 U.S. 1, 7-8. These words ["obscene,"

> "lewd", etc.], applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark "* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *"

Nor did *Miller* and its companion cases suggest that the *Roth-Memoirs*[1] standards rendered the obscenity statutes unconstitutionally vague on their face. See *United States* v. *One Reel of Film,* 481 F. 2d 206 (C.A. 1); *United States* v. *Gordon and Fleisher,* Cr. No. 73-20 (D. Vt., February 20, 1974); *United States* v. *Guarino, et al.,* Nos. 7968, 7970-7972 (D. R.I., November 14, 1973); *United States* v. *Marks,* 364 F. Supp. 1022, 1026 (E.D. Ky.); *United States* v. *Dorfman and Roka Film Enterprises,* Nos. 181-73 and 331-73 (D. D.C., August 31, 1973). Rather, the Court concluded that *Memoirs* imposed greater burdens on the regulation of obscenity than were intended by the *Roth* majority. As the Court stated (*Miller, supra,* 413 U.S. at 21-22):

> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is *"utterly* without redeeming social value." Thus, even as they repeated the words of *Roth,* the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.,* that the material was *"utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. * * *

This language hardly suggests that the Court would view Section 1462, as construed by *Roth-Memoirs,* to be

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[1] *Roth* v. *United States, supra; Memoirs* v. *Massachusetts,* 383 U.S. 413.

unduly vague. If anything the implication is that the *Roth-Memoirs* construction was unnecessarily strict, thereby depriving the government of constitutionally valid convictions by imposing an "impossible" standard of proof.

Moreover, the *Miller* requirement that obscenity statutes be limited to depictions of sexual conduct specifically described in the statute did not make Section 1462 vague *as applied* to petitioners.

In *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7, this Court limited the literal reach of 18 U.S.C. 1462 by construing the statutory terms "obscene", "lewd", etc. to reach only "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California,* * * *." The examples of proscribable representations given in *Miller,* are "[p]atently offensive representations * * * of ultimate sexual acts, normal or perverted, actual or simulated * * * [, and] of masturbation, execretory functions, and lewd exhibition of the genitals" (*Miller, supra,* 413 U.S. at 25). The court below found that each of petitioners' publications fell within those examples (Pet. App. 12-13, Table I).[2] Since petitioners' publications clearly fall within the *Miller* examples, the statute was constitutionally applied to them.

2. Petitioners also contend that the trial court's instruction to the jury to use nationwide standards of obscenity made the statute unconstitutionally vague as applied to them. This contention is also answered in our brief in *Hamling.*

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[2]"Pet. App." references are to Appendix A of the petition in No. 73-1075.

In brief, we note that in *Miller* the Court observed that at the time of trial a national standard was "correctly regarded" as "controlling" (*Miller, supra,* 413 U.S. at 30). The *Miller* resort to "contemporary community standards" may be viewed as a means of sharpening the fact-finding process of the jury. But it does not follow that all previous fact-finding was constitutionally deficient. There is no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard. Indeed, since *Miller* some courts of appeals have found that national standards are still ascertainable and appropriate in federal cases. In *United States* v. *Palladino,* No. 72-1005, decided January 7, 1974, slip op., p. 8, the First Circuit stated a preference for a national standard, then added:

> All this is not to say that evidence of national standards of prurient appeal and patent offensiveness will be unmarred by serious dispute. But neither can we say that such evidence will never be clear * * *. And the effort to identify a national standard of tolerance would seem to differ only in degree from the effort, upheld in *Miller* to identify a statewide standard in such a large, populous, and variegated state as California.

Our submission is that the use of a national standard of obscenity, at least when supported (as it was here) by expert testimony, was not too vague for the jury to grasp and apply. (See generally, Brief of the United States in No. 73-507, pp. 25-31).

3. Petitioners finally contend that the indictment—framed in statutory language—was insufficient and that the government should have been required to prove that the petitioners knew that their publications were obscene. These contentions are also answered in our brief in

Hamling (See Brief for the United States, in No. 73-507, pp. 34-37 and 43-51) and by the court below. The court below said (Pet. App. 5-6):

> Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:
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> > "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."
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> *United States* v. *Farabee,* 5 Cir., 1969, 411 F. 2d 1210, 1211; *Downing* v. *United States,* 5 Cir. 1965, 348 F. 2d 594, 599. See also *Esperti* v. *United States,* 5 Cir., 1969, 406 F. 2d 148; *Bland* v. *United States,* 5 Cir., 1962, 299 F. 2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth* and *Memoirs.* Further, in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness. [Footnotes omitted.]
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> Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

> * * * [In *Smith* v. *California,* 361 U.S. 147] [a]pparently the Court did not disturb its holding in *Rosen* v. *United States,* 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: *United States* v. *West Coast News Company,* 6 Cir., 1966, 357 F. 2d 855, rev'd on other grounds, *Aday* v. *United States,* 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed. 2d 1309; *Schindler* v. *United States,* 9 Cir., 1953, 208 F. 2d 289. See also *Kahm* v. *United States,* 5 Cir., 1962, 300 F. 2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

For the foregoing reasons, we believe that the decision of the court of appeals is correct. Since these issues are presently pending in *Hamling,* however, we suggest that the Court should defer action on these petitions until *Hamling* is decided, and then dispose of them in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.